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ABSTRACT

Legal issues involved when a religious college accepts government financial assistance and potential legal strategies that the religious colleges might use to support receipt of such assistance are considered. In order to receive government benefits, the private religious college may be placed in the position of having to prove itself predominantly secular rather than sectarian, humanistic rather than theistic. A historical strategy entails reversing earlier pronouncements regarding the doctrine of the separation of church and state. Another tactic is the argument that secularism constitutes a new religion, if religion is viewed as a process of values and is the foundation on which many schools operate. However, courts appear to assume that state universities and other "nonreligious" colleges are neutral and therefore qualify for government funds. It is suggested that giving equal treatment to all religions, including secular humanism, under the Free Exercise Clause might result in a new constitutional view of the proper relationship between church and state. According to an academic/religious freedom strategy, a teacher who teaches within the context of given "religious" presuppositions but who also presented competing theories, may claim judicial protection for himself as well as for the institutions (so no loss of funds would be necessary). The fourth strategy, the Tennessee Student Benefit Strategy, involves a new delivery system of financial aid to students, whereby the aid program focuses on the student rather than on the institution. The schools are free to compete for the students who have money provided by the program. (SW)

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GOVERNMENT FINANCIAL ASSISTANCE, RELIGIOUS COLLEGES, AND THE FIRST AMENDMENT: A CALL FOR A NEW CONSTITUTIONAL ALLIANCE

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ABSTRACT

This paper addresses relevant legal issues involved when a religious college accepts government financial assistance. Rather than limiting discussion to identification of these issues, the paper also seeks to identify potential legal strategies which could be used by religious colleges to support receipt of such assistance.

The paper suggests four potential legal strategies which could be asserted or at least argued in support of the decision to accept government assistance. These strategies are identified as follows:

1. the historical strategy
2. the "new religion" strategy
3. the academic/religious freedom strategy
4. the Tennessee "student benefit" strategy

After setting forth the particulars of these strategies, the paper concludes that religious colleges and government agencies should continue to develop an alliance, albeit an uneasy one, wherein both could achieve maximum benefits while minimizing conomitant adverse consequences.

Introduction

The dilemma facing private religious colleges in the 1980's is much like that of England in 1941. Faced with an impending German invasion, Prime Minister Winston Churchill found himself very much in need of a strengthening alliance. The German's ill-advised assault into Russia provided Churchill with a most unlikely ally--an ideological adversary.

During the past decade, in particular, a similar alliance has been forming between private religious colleges and the agencies of federal and state government. Economic pressures and tightening enrollments have led independent colleges to feed at the public trough, most willingly. At the same time, public funding has seized upon the resources of private higher education to advance imperative humanitarian goals of social and economic opportunity.

The alliance has been, and will continue to be, mutually beneficial. The caveat for the private religious college may well be that the price of this relationship is too high. A serious question of reserving institutional integrity within Constitutional propriety remains to be answered. In an increasingly litigious environment, religious colleges see court decisions cutting to the heart of their faith-related distinctives. The religious college, for example, is being told by the courts that it cannot require compulsory chapel[1] and that it must separate its secular programs from its sectarian programs if it is to receive state and federal aid.[2]

As a consequence of such decisions, governmental regulation has spread an ominous shadow over the traditional autonomy of private religious colleges.

Administrative costs to comply with expanding bureacratic and judicial mandates in terms of both staff and time are at an all-time high.[3] The dangers of this relationship are well-stated by Durham and Oaks:

> Faced with mounting financial pressure, private institutions are being driven to make themselves over in the image of state universities to facilitate obtaining access to state and federal largesse. In order to avoid the curse of being deemed "pervasively sectarian" by the Supreme Court and thus made ineligible for state aid, many religiously affiliated institutions have become pervasively secular instead . . . the resulting homogenization of independent colleges is likely to be devastating for the tradition of American pluralism.[4]

Thus, in order to receive government benefit, the private religious college may be placed in the anomalous position of having to prove itself predominantly secular rather than sectarian, humanistic rather than theistic. Such evidentiary profiles are in sharp contrast to the distinctive religious mission claimed by these same colleges in catalogs and brochures. How many of these institutions would proudly point to Judge McMillan's opinion that:

> The evidence at the hearing demonstrates that despite their many trappings and insignia of religious orientation these schools are not "pervasively" religious in profession or practice; religion there is described as an "intellectual discipline" with humanistic overtones; and these private schools do little if any more to promote religion than do the state supported schools whose public sources of funds they avidly seek to tap.[5]

For any private religious college voluntarily subscribing to such a categorization, the inquiry need go no further. The same would be true of colleges willing to forego any direct or indirect government benefit. But what of those colleges which are either unable or unwilling to separate secular programs from sectarian programs? What if the total educational program is infused with the religious mission of the college? Does such college have no other choice but to give up either its own educational philosophy or drop governmental aid?

The purpose of this analysis is to suggest that there may be some strategies, heretofore underdeveloped or judicially unapplied, which may be

of some help in resolving beneficially this issue of pervasive judicial intervention, without requiring termination of government aid. These suggested strategies will be briefly presented and discussed.

Several strategies suggested to help resolve legal conflict in this area include those which follow: 1) The historical strategy; 2) The "new religion" strategy; 3) The academic/religious freedom strategy; and 4) The Tennessee "student benefit" strategy.

I. The Historical Strategy

The historical strategy can be developed from a variety of perspectives but the primary thesis seems to be as follows. The fear of the founding fathers about religion was not negativism toward religion and government but rather that the Federal government would establish a state church or religion:

> There is a respectable body of scholarship supporting the position that at the time of our country's founding, the establishment feared most was not aid to religion, but the actual establishment of a state or national church to the exclusion of right of conscience. Colonial and early state experience can be interpreted to strongly support this position.[6]

Arguably, if the fear of the founding fathers was that of a Federal church or religion, on what did the United States Supreme Court rely in declaring that there is "a wall of separation between church and state?" It should be noted that the words "church" and "state" do not appear in the First Amendment.[7]

The language quoted above appears to have been given judicial sanction by Justice Black in the case of Everson v. Board of Education: "In the words of Jefferson, the clause against establishment of religion by law was intended to erect 'a wall of separation between church and state.'"[8] A second historical figure relied upon for support, again by Justice Black, is James Madison and further, his famous "Memorial and Remonstrance Against Religious Assessments."[9] Both Jefferson's and Madison's opinions, however, deserve careful review.

Whitehead, in his book The Separation Illusion, has extensively traced Jefferson's thoughts on the "wall of separation" and "church and state":

> The phrases had their origin in a letter written by Jefferson in 1802 to a group of Baptists in Danbury, Connecticut, in which he maintained that it was the purpose of the First Amendment to build a "wall of separation between church and state." It is not

> improbable that this statement was motivated by an "impish desire" to hurl a brick at the Congregationalist-Federalist hierarchy of Connecticut, "whose leading member" had earlier denounced him as an "infidel" and "atheist".
>
> The deceptive motivation behind Jefferson's wall-of-separation statement did not really emerge until 1805, when in his Second Inaugural Address he stated, "In matters of religion I have considered that its free exercise is placed by the Constitution Independent of the powers of the General Government. I have therefore undertaken on no occasion to prescribe the religious exercises suited to it, but have left them, as the Constitution found them, under the direction and discipline of the church or state authorities acknowledged by the several religious societies . . . ." Jefferson, in his second statement on religion, brings his view in line with the Constitution, which erects a wall between the federal government and the state government on matters of religion.[10]

In other words, Whitehead has argued that the wall of separation was not between the church and the government but rather between the state and Federal government. Religion, then, was to be a matter between the state (as compared with Federal) government and the church. Corwin has likewise spoken to this point:

> In short, the principal importance of the amendment lay in the separation which it effected between the respected jurisdictions of state and nation regarding religion, rather than its bearing on the question of the separation of church and state.[11]

This also appears to have been the position of Justice Story.[12]

Referring back to Justice Black's comments re Jefferson, it would appear that the Justice simply misconstrued Jefferson's position on this critical matter. A half-century or more of educational history would tend to affirm Corwin's position, as schools and churches were closely related, with the latter often having supported the former.[13]

In yet another case, Engel v. Vitale,[14] Justice Black relied on statements by Madison to bolster his "wall of separation" argument, and in particular, relied on Madison's "Memorial and Remonstrance."[15] Brown,

however, has argued that "to treat it (the Remonstrance) as authoritatively incorporated in the First Amendment is to take grotesque liberties."[16] Further, Whitehead has argued that:

> Justice Black erroneously believed that Madison's views in his Remonstrance were controlling when the First Amendment was drafted. Nothing could be further from the truth.[17]

A careful reading of early Congressional documents reveals that Madison did in fact introduce two proposed amendments to the new Constitution. Numbered four and five, the first was intended to restrict the Federal government re matters of religion while the latter was intended to place limits re religion on the states. The latter amendment was soundly defeated in the Senate.[18] This fact lends additional support to Corwin's conclusions hereinbefore discussed.

If Justice Black's historical analyses, which have served as the underpinings to the crucial United States Supreme Court cases dealing with the Establishment Clause are inaccurate, then on what historical substance do the decisions in these cases rest? A historical argument might well be developed to show that the judicial development of the doctrine of "separation of church and state" has been less than accurate. And such a showing, arguably, could have made a difference in the "compulsory chapel attendance" cases already decided, particularly those which relied on primarily federal constitutional arguments.

Regrettably, the historical argument seems already to have received a summary disposition by the Supreme Court and thus has limited potential as a prospective Constitutional theory. The issue was undoubtedly raised before the Court in Abington School District v. Schempp.[19] Justice Brennan records his view in a concurring opinion:

> It has been suggested, with some support in history, that absorption of the First Amendment's ban against congressional legislation "respecting an establishment of religion" is conceptually impossible because the Framers meant the Establishment Clause also to foreclose any attempt by Congress to disestablish the existing official state churches . . . . (But) it is clear on the record of history that the last of the formal state establishments was dissolved more than three decades before the Fourteenth Amendment was ratified, and thus the problem of protecting official state churches from federal encroachments could hardly have been any concern of those who framed the post-Civil War Amendments.[20]

In a dissenting opinion in the same case, Justice Stewart also recognizes that:

> The events leading to its adoption strongly suggest that the Establishment Clause was primarily an attempt to insure that Congress not only would be powerless to establish a national church, but would also be unable to interfere with existing state establishments.[21]

Justice Stewart and Justice Brennan both conclude that the First Amendment Establishment Clause has been made applicable to the states by the adoption of the Fourteenth Amendment. It also seems clear that Justice Brennan viewed the Establishment Clause as a guarantor of individual liberties, against the contention that only the Free Exercise clause should be so regarded. "The Framers did not entrust the liberty of religious beliefs to either clause alone."[22]

The concurrence of the two clauses into one measure of religious freedom can be seen in Black's famous definition:

> The "establishment of religion" clause of the First Amendment means at least this: Neither a state nor the Federal Government can set up a church. Neither can pass laws which aid one religion, aid all religions, or prefer one religion over another. Neither can force nor influence a person to go to or to remain away from church against his will or force him to profess a belief or disbelief in any religion. No person can be punished for entertaining or professing religious beliefs or disbeliefs, for church attendance or nonattendance.[23]

It is worthy of note that the Justices in Everson were in unanimous agreement with this broader interpretation of the Establishment Clause.

When urged in McCollum v. Board of Education to repudiate the Everson definition, Justice Frankfurter responded:

> We are all agreed that the First and Fourteenth Amendments have a secular reach far more penetrating in the conduct of Government than merely to forbid an "established church."[24]

The Court was thus set upon a course which has resulted in various kinds of searching inquiries into the substance of private religious colleges, inquiries thought necessary to avoid aiding in the "establishment" of religions. As a clarifying judicial precept for future cases, therefore, the narrower historical strategy would seem to be precluded by strong precedent. The Court would, in effect, be required to reverse rather than distinguish the earlier pronouncements on this issue.

II. The New Religion Strategy

The concern about the development of a "new religion" has been nicely summarized by Blanton: "There is now nationally rampant, according to this argument, a new religion--Secularism--and it is supported overwhelmingly by both state and federal funds."[25]

One of the most difficult issues in developing this argument is a workable, utilitarian definition of the concept "religion." Inasmuch as the context of the First Amendment pertains to "religion," the Amendment cannot be clearly understood until some handles have been developed which will assist in the analysis of the definitional problem.

Several early judicial decisions such as an 1803 New Hampshire Supreme Court case and the 1890 United States Supreme Court case of Davis v. Beason attempted to define "religion." In the New Hampshire case, "religion" was defined as follows:

> Religion is that sense of Deity, that reverence for the Creator, which is implanted in the minds of rational beings . . . . It must be the result of personal conviction. It is a concern between every man and his Maker.[26]

And in the Davis case, the United States Supreme Court defined religion thusly:

> The term "religion" has reference to one's views of his relations to his Creator, and to the obligations they impose of reference for his being and character, and of obedience to his will.[27]

It seems fair to conclude that these early definitions had a decidedly Judeo-Christian pretext where God was considered to be a person or subject worthy of adoration and devotion.

Professor Harold Stahmer of the University of Florida has appropriately categorized these kinds of religious definitions as "establishment definitions."[28] In other words, where a court deals with a colorable claim of unconstitutionality with regard to the First Amendment's Establishment Clause, these "establishment definitions" are the kinds of definitions courts rely on to circumscribe their analyses. Stahmer has further argued that "establishment" definitions generally involve six definitional elements:

a) Belief in a transcendental personal Being or God, who may or may not also have immanent concerns, and who usually is referred to as God, Diety, Creator, Savior, Redeemer, Revealer or Maker.

b) A direct or indirect reference to the Christian God or Diety.

c) The existence of a formal clergy set apart to minister to the needs of the faithful.

d) The existence of a Sacred writ or Scriptures believed by many or most adherents to be divinely inspired.

e) The existence of creeds and rituals that visibly identify believers or adherents of a particular religion.

f) The embodiment of such religious beliefs and practices with a cult or corporate body of believers rather than viewing these practices as private or solitary expressions of religious belief.[29]

To Stahmer's list could be added the use of religious symbols, whether artifacts, clothes, or buildings. One need only review the variety of church-state, religious college decisions to see judicial use of this type of "establishment" definition for analysis and decision purposes.[30] It's interesting to note that these "establishment" definitions rely wholly or in part on interpretations of religion as ascribed to and practiced by organized churches. Yet as Tussman has noted, the First Amendment "does not speak specifically of churches, but of religion."[31]

In addition to the development and analysis of the Establishment Clause definition, there has been the concurrent development of a Free Exercise

definition of religion. What characterizes the "Free Exercise" definitions is their willingness to include "non-conventional and non-traditional forms of religious expression and belief as well as the more conventional and traditional."[32] Characteristic of these kind of definitions are cases such as Torcaso v. Watkins,[33] Washington Ethical Society v. District of Columbia,[34] United States v. Welsh,[35] and United States v. Seeger.[36] In Torcaso, the following language re religion appears:

> We repeat and again reaffirm that neither a State nor the Federal Government can constitutionally force a person to "profess a belief or disbelief in any religion." Neither can constitutionally pass laws or impose requirements which aid all religions as against non-believers, and neither can aid those religions based on a belief in the existence of God as against those religions founded on different beliefs.[37]

The Court then proceeded to list in its footnote eleven examples of such religions not founded on a belief in God:

> Among religions in this country which do not teach what would generally be considered a belief in the existence of God are Budhism, Taoism, Ethical Culture, Secular Humanism and others.[38]

In Washington Ethical Society, the following comment is pertinent to the definition of religion:

> Reference to standard . . . definitions discloses that the term "religion" and "religious" in ordinary usage are not rigid concepts. Indeed, the definitions . . . are by no means free from ambiguity. Some definitions would include only the Christian religion. Some call for belief in and worship of a divine ruling power or recognition of a supernatural power controlling man's destiny. But also included in these definitions is the idea of devotion to some principle, strict fidelity or faithfulness, conscientiousness, pious affection, or attachment.[39]

The test of "religion" for Justice Clark in Seeger was whether or not such was:

> A sincere and meaningful belief which occupies in the life of its possessor a place parallel to that filled by the God of those admittedly qualifying for the exemption.[40]

If a person had this kind of belief, as did Seeger in the instant case, then such person's belief qualified as a religion and thusly for "religious" protection.

This Free Exercise definition evolves further into the discussion of religion and values, for persons like Ferre have defined religion as "a way of valuing," as "valuation." Religion as valuing, then, has to meet several kinds of criteria. Ferre has listed these criteria:

a) It must be something that involves the whole of man's life.

b) It must be something open to all kinds of people.

c) It must be something that issues naturally in widely varied ideas or beliefs, beliefs often held with great tenacity.

d) It must be something that issues naturally in widely various activities or practices, practices often clung to with great fervor and attendant with powerful emotions.

e) It must be something that may be found either privately or socially.

f) It must be something that may be open to different opinions concerning its truth or falsity or its capacity for either one.

g) It must be something that has consequences that may be considered either beneficial or harmful.[41]

These components come very close to those elements listed by Justice Clark in Seeger.

Thus far in the development of this second argument we have made the following observations. First, the The First Amendment proscribes the "establishment of religion". Second, religion is a process of values and valuing. Third, secular humanism is a judicially defined religion. A cursory reading of Humanist Manifesto I and Humanist Manifesto II, and the affirmations contained therein arguably demonstrate that such documents fit the Free Exercise definition of religion.[42] As such, secular humanism appears

to represent a fairly refined set of values. And it is the process of instilling these secularist values, arguably a religion, into the educational setting which is producing the "hue and cry."

Many are the writers who discuss values and their involvement with the education process. According to Phillips, "The concept of value-free education is a myth":

> We teach values explicitly through curriculum on the virtues of democracy, but also implicitly through the rules, regulations, procedures, ways of relating to the school and classroom. The democratic teacher teaches democracy; the kind teacher, kindness.[43]

Arons has added his perspective:

> Because value inculcation cannot be eliminated from schooling, the notion of value-neutral education implicit in the legal definition between religion and secular education is untenable (emphasis added). Up to this point, the effect of the court schooling cases has been to uphold and entrench the legal fiction that schooling can be value neutral . . . .[44]

Finally, attorney James McKenna has made some very pointed observations on this matter. Comparing an educational system based on secular humanism to one based on theism, he notes:

> If man is a transitory, ephemeral animal, his sole value is the here and now, and his education is surely best oriented toward learning to cope. If, however, man is a creation of an intelligent God, and if he endures beyond today, then his values are determined by his nature and his Creator and his education is principally theological. In neither alternative can the educator escape a value system. Not in the name of pluralism. Not in the name of dispassionate even-handedness--not under any pretext whatsoever, and I charge that he (the educator) knows it. In other words, the truth dawning on parents--be they creekers and rednecks in West Virginia or Goldcoasters from the Long Island Sound area of Connecticut--is that education is a sectarian occupation (emphasis added). It presupposes that there is a set of values animating every subject--be it mathematics, the physical sciences, or those famous things which go by the name of social science . . . .
>
> I do not complain about the actuality of education with a viewpoint. I complain about the actuality of education with a viewpoint and attempting to mask it as physical science (speaking of

> evolution) as sure as mathematics and distinguishing yourself standing close to the altar of truth from the poor boob who stands at the back and educates for the purpose of adhering to a divine-revealed religion.[45]

The supreme irony in this statement by McKenna is that the current state of judicial affairs is that the institution which educates from a "religious" viewpoint (in the Free Exercise definition sense) rather than from a divinely revealed "religious" viewpoint (in the Establishment definition sense) appears to be entitled to certain state and Federal funds while the one which educates from a divinely revealed "religious" viewpoint is either precluded from the receipt of such funds or must modify "religious" programs/mission in order to receive such funds. Further, judicial records appear to be silent as to whether or not colleges educating from the Free Exercise religious viewpoint are eligible for such aid. In other words, courts appear to assume that state universities and other "non-religious" colleges are neutral and accordingly expect the "religious" college to carry the burden of demonstrating the existence of secularism on their campuses in both programs and philosophy in order to qualify for government aid. As Jones has observed:

> The fact of the matter has been though, that many times public institutions have been secularistic as well as secular . . . . A secularistic philosophy should no more be established in a public institution than a theistic philosophy.[46]

Again, a restructuring of judicial opinion in this area arguably would have made a difference in some of the cases already decided at religious liberal arts colleges.

III. Academic/Religious Freedom Strategy

A third strategy, in addition to the "historical" and" new religion" strategies, is the "academic freedom/religious freedom" strategy. In the Bubb tuition case in Kansas, one of the cases which precluded religious colleges from requiring chapel if state funds were received, the District Court noted that the professors taught objectively: "All of the evidence presented by students taking religion courses indicates the instructors are neutral in their approach . . . ."[47] What, however, does "objective teaching" mean? Does "objective teaching" mean that one teaches without a viewpoint? Holmes has summarized his position on this issue:

> (I)f intellectual objectivity is presuppositionless thinking or learning without guiding purpose, then it exists neither in the Christian college nor anywhere else. Neutrality on matters of belief and value is humanly impossible. Objectivity consists rather in acknowledging and scrutinizing one's point of view and testing presuppositions. It is more a matter of honesty than of neutrality. Every Scholar has his commitments (emphasis added).[48]

Michigan State professor John Moore recently made a similar observation:

> I feel that it is high time now that taxpayers be assured that their young people hear a fair presentation of both sides of the issue . . . . If monopoly is inordinately wrong in industry, I ask rather pointedly, isn't monopoly (in terms of educational viewpoints) inordinately wrong in education? In a pluralistic university, it is logical we present more than one point of view.[49]

The point here is this. If, as in Bubb, the court was concerned implicitly with teaching from a religious viewpoint, and if the preceding analysis involving religion as valuing is somewhat plausible, could not a teacher who taught within the context of given "religious" presuppositions but who also presented competing theories, claim judicial protection for himself/herself as well as for the institution (so no loss of funds would be necessary) under either an academic freedom or religious freedom argument?

A recent Yale Law Journal article suggests, furthermore, that teachers who present only one point of view at the exclusion of other views, are violating the constitutional rights of their students.[50] This would be true at both public and private colleges, whether or not "religious." As a University of Missouri professor has recently observed:

> The university must come to grips with the fact that every academic theory is in part a religion . . . and that it is intellectually dishonest to proscribe one particular point of view because it is "religious."[51]

There is some possibility that this free exercise/academic freedom approach could meet with success in the future. In a 1974 interview with Justice Clark, author of Abington School District v. Schempp,[52] he made the following observations about Free Exercise cases and future litigation:

> And we haven't had many cases, direct ones, on the "free exercise" clause. I really think that you're going to find that that will possibly be developed more in the near future . . . and that perhaps the ideas of Justice Stewart in Schempp might take hold. I would think there's a great opportunity in that area, speaking now from a legal standpoint, of developing just what the "free exercise" clause does permit. And I think you'll find the court receptive in that area. I would hope so.[53]

Two points of attack would seem available under the Free Exercise Clause, one based upon individual rights and the other based upon institutional rights. The former issue is most clearly the basis for Justice Stewart's dissent in Schempp, a case in which the majority held mandatory reading of Bible verses in public schools to violate the Establishment Clause. Justice Stewart recognized that the case held a "substantial free exercise claim" on the part of parents who "affirmatively desire to have their children's school day open with the reading of passages from the Bible."[54]

How is this choice of individual rights to be exercised? Pierce v. Society of Sisters established the right of parents to send their children to non-public schools, where such religious exercises are permissable.[55] But, Stewart argued, such First Amendment rights cannot be reserved only for those financially able to pay their own way. Further, does government maintain a neutral position if parents can only seek religious influence outside of the public school experience? Stewart thought not, for:

> . . . a refusal to permit religious exercises thus is seen, not as the realization of state neutrality, but rather as the establishment of a religion of secularism, or at the least, as government support of the beliefs of those who think that religious exercises should be conducted only in private.[56]

On what basis, then, would Stewart permit religious preferences to be expressed within secular institutions? Clearly, "that issue . . . turns on the question of coercion."[57] Stewart would uphold an exercise which merely provides "an opportunity for the voluntary expression of religious belief."[58] On the other hand, he would strike down efforts shown "to entail the use of the secular authority of government to coerce a preference" among different religious beliefs.[59]

The same concern for coercive religious instruction or proselytization is reflected in the Court tests of "pervasive sectarianism" at private religious colleges receiving government assistance. In Tilton, the Court minimized the possibility of coercive influence by noting that "college students are less impressionable and less susceptible to religious indoctrination."[60] Following the same Tilton rationale, Roemer concluded that "religious indoctrination is not a substantial purpose or activity of any of these defendants."[61]

Is it possible that a private religious college could assert a theory of academic/religious freedom as a basis for nonintervention by governmental

authority in critical faculty and student relationships, and then effectively deny these same freedoms by institutional practices such as required chapel, mandatory Bible instruction or pedagogical restrictions? The Free Exercise Clause would appear to serve as a two-edged sword. Justice Stewart would allow voluntary religious expression but deny coercive, involuntary religious expression.

The danger here is running afoul of the balancing considerations of the Establishment Clause. If "academic freedom" on the religious college campus does not include the teaching of both the "heretic"[62] and the believer, then does that campus ipso facto become a pervasively sectarian institution? Would the Court expect all faculty, outside of theology departments, to be free to teach or not to teach from a distinctly religious viewpoint? Must students be free to attend or not to attend courses in religious instruction or assemblies for worship? Certainly, this would be the case if the principle were applied to a secular insitution.

But the contract of enrollment or employment at a private religious college is a voluntary act. If entered with the knowing consent of all parties, then the concern for a coercive impact on the individual would seem to be remote. Just such a consensual view of academic freedom has been incorporated into the definition subscribed to by the American Association of University Professors, which definition should be commended to the Supreme Court as encouraging self-regulation by the academic community:

> The teacher is entitled to freedom in the classroom in discussing his subject, but he should be careful not to introduce into his teaching controversial matter which has no relation to his subject. Limitations of academic freedom because of religious or other claims of the institution should be clearly stated in writing at the time of appointment.[63]

Under the academic religious freedom argument, it can be further argued that not only individuals but also institutions should be protected by the

First Amendment. Durham and Oaks have forcefully argued this second point of attack:

> The idea of institutional rights relies on two strands of legal doctrine. The first of these involves questions of standing and asserts that institutions are authorized to assert constitutional rights both to protect their own interests and to protect the rights of third parties which cannot otherwise receive as effective or expeditious protection. The second involves the ways in which various constitutionally protected rights, such as freedom of speech, association, religion, and academic freedom, can be construed to give broad protection to the autonomy of independent colleges and other institutions whose inner workings implicate important constitutional values.[64]

Further, Durham and Oaks contend that there are fundamental First Amendment rights inherently attached to the independent college. Under the doctrine of "unconstitutional conditions" first enunciated in Sherbert v. Verner,[65] access to government benefits cannot be qualified by the forfeiture of a constitutional right. Religious colleges should not, these authors argue, be required to forego protected rights or beliefs in order to participate in government educational aid programs.

In a concurring opinion in the case of Sweezy v. New Hampshire,[66] Justice Frankfurter cited with approval four elements thought essential to academic freedom in colleges and universities--"to determine for itself on academic grounds who may teach, what may be taught, how it shall be taught, and who may be admitted to study."[67] Gaffney illustrates this point:

> For example, in Meyer v. Nebraska (262 U.S. 390 (1923)) the Court invalidated state legislation which prohibited the teaching of the German language. In Epperson v. Arkansas (393 U.S. 97 (1968)) the Court struck down a state law which forbade the teaching of "the theory or doctrine that mankind ascended or descended from the lower order of animals." Neither of these cases mention the phrase academic freedom, but both may be viewed as setting limits on governmental control of the curriculum.[68]

Where Durham and Oaks would base their contention on "institutional rights," Gaffney would characterize this argument as an assertion of a further First Amendment right to "freedom of association."[69] The line of reasoning, however, is similar: religious colleges are possessed of certain inalienable First Amendment rights which cannot be compromised by the receipt of governmental benefits.

The assertion of individual and institutional rights under an academic/religious freedom strategy may offer a viable alternative for future Supreme Court decisions.

IV. Tennessee Student Benefit Strategy

The fourth and final strategy suggested is that a new delivery system of financial aid to students be created. Here, the recent case of Americans United for Separation of Church and State v. Blanton,[70] is instructive. Blanton has had a prolonged legal history. Initially Americans United for Separation of Church and State v. Dunn, [71] the Court found for Americans United in holding that a Tennessee aid program was being administered unconstitutionally because there was no state restriction limiting funds to non-sectarian uses on private religious campuses.

The case was accepted for appeal by the United States Supreme Court along with Roemer but was remanded to the District Court because the Tennessee legislature had subsequently changed the contested statute so as to include a sectarian use proscription. Ultimately, the entire legislative program was changed in favor of a new one which was designed to directly aid the student, not the institution. Since sectarian use proscriptions were tied to institutional aid programs and since by definition the new program was not an institutional aid program, such a prohibition was not included in the new legislation.

In applying the tripartite test of Lemon v. Kurtzman,[72] the Blanton court found, first, a secular legislative purpose and, second, no impermissable entanglement. The court then cited three primary factors which resolved the question of whether the statute had a "primary effect" which either advances or inhibits religion:

> . . . the emphasis of the aid program is on the student rather than the institution, and the institutions are free to compete for the students who have money provided by the program. No one religion is favored by the program, nor are private or religious institutions favored over public institutions.[73]

In essence, the court concluded that since the primary effect of the state statute was to benefit students, without discrimination between public

and private institutions, the religious practices of the educational institutions where students choose to attend were legally irrelevant. By affirming the District Court's ruling without opinion, the Supreme Court has given life to this theory.

Where only student benefits are at issue, Blanton would replace the artificial probe for "pervasive sectarianism" with a more objective test of procedural neutrality. Where either a direct institutional benefit or a lack of procedural neutrality could be demonstrated, however, the Tennessee student benefit argument would lose its force.

Conclusion

Given the complexity of the three other suggested arguments or options, it appears that the Tennessee approach, applied on a broader scale, would be the easiest of the four to implement. The irony of the new religion strategy, permitting aid to any institution embracing a secular religion but not to a God-centered religion, is a compelling illustration of the confusion of Court decisions in this area. Giving equal treatment to all such "religions" under the Free Exercise Clause might result in a new Constitutional view of the proper relationship between church and State.

The academic/religious freedom strategy also holds some promise. It is a theory which must balance the joint and several concerns of the First Amendment, quite like the balance which the private religious college must maintain between institutional integrity and financial viability.

Inasmuch as there do appear to be options available by which the religious college can attempt to defend its religious mission as well as challenge uninvited and unwarranted governmental and judicial intrusions into institutional affairs, it is hoped that, in the critical decade ahead, the Courts will seek continued ways in which to strengthen the present alliance between private religious colleges and the state.

FOOTNOTES

1. Americans United for Separation of Church and State v. Bubb, 379 F. Supp. 872 (D. Kan. 1974). Accord, Lendal v. Cook, 432 F. Supp. 971 (E.D. Ark. 1977); and Smith v. Bd. of Governors of University of N.C., 429 F. Supp. 871 (W.D.N.C. 1977).

2. Tilton v. Richardson. 403 U.S. 726 (1971). Accord, Hunt, v. McNair, 413 U.S. 734 (1973), Roemer v. Board of Public Works, 426 U.S. 736 (1976). See C. Wilson, Tilton v. Richardson, The Search for Sectarianism in Education (1971); Recent Developments, "Constitutional Law-First Amendment-State Aid to Non-Public Sectarian Colleges," 44 Tenn. L. Rev. 377 (1977). And see H. Edwards and V. Nordin, Higher Education and the Law, 42-53 (1979).

3. "The High Cost of Compliance," Chron. of Higher Ed., July 21, 1975, at 1.

4. W. Cole Durham, Jr. and Dallin H. Oaks, "Constitutional Protections For Independent Higher Education: Limited Powers and Institutional Rights," Church and College: A Vital Partnership, The National Congress on Church-Related Colleges and Universities, 69 (1980).

5. 429 F. Supp. at 880.

6. Blanton, "The Entanglement Theory: Its Development and Some Implications for Future Aid to Church-Related Higher Education," 7 J.L. & Educ. 359, 417 (1978).

7. The First Amendment reads in part, "Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof . . . ."

8. 330 U.S. 1, 17 (1947). See generally, F. Sorauf, Wall of Separation: The Constitutional Politics of Church and State (1976).

9. II Writings of James Madison, at 183-191. See also, W. Berns, The First Amendment and the Future of American Democracy (1976). Berns' argument is that the Supreme Court has looked to inappropriate sources to determine the meaning of "separation of church and state." Instead of focusing on the works of Madison, such as his Remonstrance, the Court should have looked instead to the Constitutional Convention, where a perspective other than that of Madison's was in evidence. Berns' conclusion is that the Court has construed the "separation" clause too narrowly and to the nation's detriment.

10. J. Whitehead, The Separation Illusion, 89 (1977).

11. E. Corwin, American Constitutional History, 205 (1965).

12. J. Story, Commentary on the Constitution of the United States, 605-606 (1873). See also, J. Peltason, Understanding the Constitution, 125 (1976).

13. See generally, M. Curti, The Social Ideas of American Educators, 3-49 (1971).

14. 370 U.S. 421 (1962).

15. Ibid., at 436.

16. E. Brown, "Quis Custodiet Ipsos Custodes?--The School Prayer Cases," in Supreme Court Review, 8 (1963).

17. J. Whitehead, op. cit., at 102.

18. I Annals of Congress, 759-784. See generally, K. Padover, The Complete Madison (1953).

19. 374 U.S. 203 (1963).

20. Ibid., at 254, 255.

21. Ibid., at 309, 310.

22. Ibid., at 256.

23. 330 U.S. at 15, 16.

24. 333 U.S. 203, 213 (1947).

25. Blanton, op. cit., at 417. See also, W. Ball, Litigation in Education: In Defense of Freedom, 14-15 (1977).

26. H. Stahmer, "The Definition of Religion," in Religious Studies in the Curriculum: Retrospect and prospect, 1963-1983, 33 (1974).

27. 133 U.S. 333 (1890).

28. H. Stahmer, op. cit., at 33. See also, W. Ball, "What is Religion?" 8 The Christian Lawyer 7 (1979).

29. Ibid., at 33, 34.

30. See, for example, notes 4, 5, supra.

31. J. Tussman, "Introduction," in The Supreme Court on Church and State, 14 (1962).

32. H. Stahmer, op. cit., at 35.

33. 367 U.S. 488 (1961).

34. 101 U.S. App. D.C. 371, 249 F.2d 127 (1957).

35. 398 U.S. 333 (1970).

36. 380 U.S. 163 (1965).

37. 367 U.S. at 495. See also, Hon. John Conlan, Memorandum, September 9, 1976, to House Conferees on H.R. 12851/S.2657 dealing with Conlan's Secular Humanism Amendment to H.R. 12851.

38. 367 U.S. at 495.

39. 249 F.2d and 129.

40. 380 U.S. at 176.

41. F. Ferre, Basic Modern Philosophy of Religion, 35-36, 60, 63 (1967).

42. "Humanist Manifesto I" in 6 The New Humanist, No. 3 (1933). See also "Humanist Manifesto II" 33 The Humanist, No. 5 (1973).

43. Phillips, "Confluent Education, the Hidden Curriculum, and the Gifted Child, 58 Kappan 238 (1976).

44. Arons, "The Separation of School and State: Pierce Reconsidered," 46 Harv. Educ. Rev. 76, 78, 97 (1976). See also, R. Wilson, et. al., College Professors and Their Impact on Students, 190 (1975).

45. McKenna, "Serrano v. Priest--Where Have You Lead (sic) Us?" Imprimis, March, 1975 at 4.

46. Jones, "An Educational Perspective: Learning Experiences in Campus Ministries," unpublished manuscript, Ball State University, 1975, at 3.

47. 379 F. Supp. at 882.

48. A. Holmes, The Idea of a Christian College, 87 (1975).

49. "MSU Science Prof Gives Nod to God," MSU Alumni Magazine, Summer, 1978, at 14.

50. See generally, Note, "Freedom of Religion and Science Instruction in Public Schools," 87 Yale L.J. 571 (1978).

51. March 9, 1976 letter from C. Anderson (University of Missouri-Columbia) to M. Cosgrove, Dallas, Tex.

52. 374 U.S. 203 (1963).

53. Justice Tom Clark, "Personal Reflections on the Schempp decision," in Religious Studies in the Curriculum: Retrospect and Prospect, 1963-1983 21 (1974). See also, O. Arnold, Religious Freedom on Trial, 92-102 (1978); Galanter, "Religious Freedoms, in the United States: A Turning Point?" 1966 Wis. L. Rev. 217; Giannella, "Religious Liberty, Nonestablishment, and Doctrinal Development," 80 Harv. L. Rev. 1381 (1967); P. Kauper, Religion and the Constitution (1964); and P. Kurland, Religion and the Law (1962).

54. 374 U.S. at 312.

55. 268 U.S. 510 (1925).

56. 374 U.S. at 313.

57. Ibid., at 316.

58. Ibid., at 318.

59. Ibid., at 317.

60. 403 U.S. at 686.

61. 426 U.S. at 754.

62. 379 F. Supp. at 896. Judge Brown's concurring opinion stated that "The heretic teaching is as much a requirement of academic freedom as the advocacy of religious thought."

63. American Association of University Professors, "Policy Documents and Reports," Washington, D.C., (1977).

64. Durham and Oaks, op. cit., at 83.

65. 374 U.S. 398 (1963).

66. 354 U.S. 234, (1957).

67. Ibid., at 263, quoting "The Open Universities in South Africa," a remonstrance by scholars against then existing policies.

68. Edward M. Gaffney, Jr., "The Constitution and the Campus: The Case for Constitutional Integrity and the Need For Critical Self Evaluation," Church and College: A Vital Partnership, The National Congress on Church-Related Colleges and Universities, 47, 49 (1980).

69. Ibid., at 60.

70. 433 F. Supp. 97 (M.D. Tenn. 1977), aff'd 98 S. ct. 39 (1977).

71. 384 F. Supp. 714 (M.D. Tenn. 1974).

72. 403 U.S. 602 (1971).

73. 433 F. Supp at 104.